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Attorneys for Defendants
City of San José and Debra Figone, in Her
Official Capacity

IN THE SUPERIOR COURT FOR THE

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive.,

Defendants.

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Consolidated Case No. 1-12-CV-225926

*Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV*227864, *112CV*233660

Assigned for all purposes to the Honorable Patricia M. Lucas

DEFENDANTS' OPPOSITION TO PLAINTIFF AFSCME LOCAL 101'S MOTION FOR PAYMENT OF EXPENSES OF PROOF UNDER CCP SECTION 2033.420

Date: September 25, 2014
Time: 9:00 am
Dept: 2, Honorable Patricia Lucas

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I. INTRODUCTION

AFSCME propounded irrelevant, burdensome, and harassing discovery to the City of San Jose, including 88 Requests for Admission. These Requests for Admission did not seek factual information but asked the City to agree to sweeping propositions of law or argumentative paraphrasing of the San Jose Municipal Code and Charter. The City objected to these Requests and denied them based on their over-breadth and inaccuracy.

AFSCME now attempts to obtain attorney's fees on the theory that AFSCME "proved" these Requests for Admission within the meaning of California Code of Civil Procedure Section 2033.420(a). Even a cursory review of the Requests show the contrary.

AFSCME succeeded on very little at trial, with the Court invalidating only three of thirteen sections of Measure B, and dismissing many of AFSCME's claims which had consumed significant trial time. AFSCME certainly did not "prove" the broad and argumentative propositions of law contained in its Requests for Admission, such as "Measure B, if implemented, would impair vested contractual rights . . . . " Instead, the Court upheld most of Measure B against AFSCME's vested rights challenges. Nor did AFSCME "prove" its paraphrasing of San Jose's ordinances, or of Measure B. The actual text of these ordinances and Charter section were not contested at trial, and all provisions of the Charter and City ordinances were admitted without objection or by express stipulation.

Even if AFSCME could somehow be viewed as proving a Request for Admission, the Requests are so overbroad that they come within the exceptions in Section 2033.420(b): The Requests for Admission were "of no substantial importance," the City had "reasonable ground to believe" it would prevail on the matter, and "there was other good reason for the failure to admit."

AFSCME's motion is inconsistent with the purpose of Section 2033.420. AFSCME's Requests for Admission did not address disputed issues of fact to be "proven" at trial. Rather, the Requests for Admission asked the City to agree to questions of law to be decided by the Court. AFSCME has cited no case that applied Section 2033.420 in this context. If AFSCME's approach were permitted, any party could simply propound a broad Request asking the other to admit liability, and later seek to recover fees if successful at trial. This gamesmanship is not

contemplated by the Rules of Civil Procedure.

The Court must deny this motion.

II. THE REQUESTS FOR ADMISSIONS

AFSCME propounded 88 Requests For Admissions to the City. The Requests consisted of (1) vague and overbroad statements of law, and (2) incomplete paraphrasing of the San Jose Municipal Code or Measure B. AFSCME relies on the following Requests in connection with this motion.

A. Requests Containing Vague and Overbroad Statements of Law.

Request Nos. 2, 3, and 8 contained generalized statements of law not specifically at issue in the litigation.

For example, Request No 2 stated: "YOU ARE REQUESTED TO ADMIT THAT employees of San Jose have a right to the benefits that derive from the System under the terms and conditions in effect at the time such employee accepted employment with San Jose." Similarly, Request No. 8 stated: "YOU ARE REQUESTED TO ADMIT that Measure B reduces or eliminates portions of employee retirement benefits." These requests contained generalized statements of law concerning "benefits" and are not tied to the specifics of Measure B sections found invalid by the Court—contribution rates, VEP, or COLA.

A number of requests asked the City to admit, in generalized terms, that Measure B violated employees' vested rights or City "promises." *See* Request Nos. 18, 27, 32, 42, 60, 61, 64, 69. For example, Request No. 64 stated: "YOU ARE REQUESTED TO ADMIT THAT Measure B. if implemented, would impair vested contractual rights with respect to miscellaneous employees' retirement benefits." Again, this and other requests are extremely general statements of law, and do not relate to the specific determinations made by the Court.

B. Requests Paraphrasing the Municipal Code And Measure B.

Many requests paraphrased the Municipal Code or Measure B.

Request Nos. 20, 21, 24, and 43 through 45 paraphrased the Municipal Code sections that set forth the benefit formulas applicable prior to Measure B, *e.g.*, pension formulas, COLA formulas. There was no issue at trial as to the actual content of these Municipal Code sections and

the benefits they provided.

Request Nos. 25, 33, 34, 35, 37, 38 and 39 paraphrased various sections of Measure B, including the sections on employee contribution rates and the VEP. Again, as with the Municipal Code, there was no issue at trial as to the actual text of Measure B or the benefits provided under it.

C. The City Consistently Objected To The Requests For Admissions.

During the litigation, the City made it clear to AFSCME that it would deny the RFAs because they were overbroad statements of law or paraphrased the Code and Charter. The City's meet-and-confer letter stated:

> III. REQUESTS FOR ADMISSIONS
>
> You have served the City with 88 Requests for Admission, again in excess of the 35 permitted without a declaration demonstrating necessity. These requests are for the most part objectionable as vague, irrelevant and not likely to lead to the discovery of admissible evidence.
>
> Nos. 1, 2, 3, 6, 7, 8, 9. These requests are extremely vague and overbroad. They are not tied to Measure B, or any particular retirement benefit, but rather use general terms such as "benefits that derive from the System," "deferred compensation," "excise on current and future City employees," "entire employees," and "condition subsequent" among others. As they stand now, the City will need to deny these requests because they are so general.
>
> Nos. 11-55, 59, 60, 64, 79. These requests paraphrase City Charter and Administrative Code provisions on retirement benefits and also paraphrase the provisions of Measure B. Similarly, Nos. 82-88 paraphrase documents or official acts that will be the subject of judicial notice. Most of the issues in this case are questions of law concerning interpretation of the City's Charter, Administrative Code, and other written materials. There is no issue of fact concerning the actual language of these materials and the Court could take judicial notice of them. Therefore, most of your Requests for Admission are completely unnecessary, and in fact are simply harassing, because there is no issue of fact to be established. Even worse, your requests paraphrase the law, or official documents, when the exact language is important to the case. As a result, the City is not required to admit to requests in which you paraphrase, or partially track, the law and is entitled to deny instances where you do so.

Letter dated October 1, 2012, from counsel for City of San Jose, to Teague Patterson, counsel for AFSCME, attached as Exhibit C to Decl. of Teague Patterson.

III. ARGUMENT

Under Code of Civil Procedure section 2033.420, a party may obtain expenses and attorneys' fees expended to prove certain facts only when the costs expended were the result of an opposing party unreasonably denying a Request for Admission (RFA). Cal. Civ. Proc. Code § 2033.420.

> (a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requiring that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable fees.
>
> (b) The court shall make this order unless it finds any of the following:
>
> (1) An objection to the request was sustained or a response to it was waived under Section 2033.290.
> (2) The admission sought was of no substantial importance.
> (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.
> (4) There was other good reason for the failure to admit.

Cal. Civ. Proc. Code § 2033.420. These costs-of-proof awards are treated as sanctions and are only appropriate where a party makes a bad faith denial of an RFA. *See, e.g.*, *Brooks v. Am. Broadcasting Co.*, 179 Cal.App.3d 500, 5510-11 (1986). The burden rests on the moving party to show that an RFA was unjustly denied. *Id.* § 2023.040. Plaintiff's motion must be denied because it cannot meet its burden.

A. AFSCME Did Not Prove The Truth Of The Requests for Admission.

As a threshold matter, AFSCME cannot show that it proved the truth of the RFAs. The Court entered judgment for AFSCME on only three sections of Measure B: Sections 1506-A (Increased Pension Contributions—Current Employees), 1507-A (One Time Voluntary Election Program), and 1510-A (Cost of Living Adjustments). (Judgment, paragraph 4.) But the "proving" of any of AFSCME's RFAs was not integral to any of these rulings. In fact, a review of the RFAs shows that AFSCME did not "prove" the truth of them in the course of the litigation.

To collect fees, a party must actually prove the "truth" of the RFA at trial. *See Stull v. Sparrow*, 92 Cal.App.4th 860, 865 (2001) (no fees awarded where plaintiff did not "produce any

proof" on an element of her case when defendant admitted to liability before trial); *Wagy v. Brown*, 24 Cal.App.4th 1, 6 (1994) (holding that plaintiffs had not proven the truth of the matter contained in an RFA, but had simply prepared to submit proof). These cases squarely hold that no fees can be awarded unless a plaintiff actually proves an RFA at trial. AFSCME did not "prove" any of the broad propositions of law contained in its RFAs at trial. For this reason, AFSCME's motion must be denied.

1. Section 1506-A

There was nothing in the Court's ruling on Section 1506-A that proved the truth of any of AFSCME's Requests for Admissions.

Section 1506-A required employees to make additional pension contributions to pay for retirement plan unfunded liabilities. The Court held that Section 1506-A was invalid because the City's ordinances had created a vested right in the City paying for unfunded pension liabilities. (Statement of Decision p. 16) But none of the Requests for Admission addressed this specific issue.

AFSCME claims that the City denied the Court's ultimate finding when the City denied Request No. 18. AFSCME Br. p. 10. Not true. Request No. 18 stated: "YOU ARE REQUESTED TO ADMIT that prior to Measure B, the City has been responsible for ensuring payment of shortfalls between the System's assets and the actuarially determined liability for all benefits owed by the System." This Request contained a generalized statement that related to "all benefits owed by the System" and not just to pension unfunded liabilities. The Court's decision did not find that the City had been historically responsible for all "shortfalls." In fact, the Court held that the City was not responsible for retiree healthcare unfunded liabilities. Statement of Decision, pp. 28-29 [The Municipal Code does not grant employees protection against contributions to unfunded liabilities relating to healthcare benefits."]

AFSCME also claims that it proved the truth of Request Nos. 32 and 33 at trial. This also is not true. Requests Nos. 32 and 33 partially paraphrase Measure B whereas the actual text, and financial effect of Measure B, was not in dispute at trial. For example the Court's statement that Section 1506-A "provides for increased pension contributions up to 16%, but no more than 50%

of the costs to amortize any non-Tier 2 pension unfunded liabilities" simply repeated the text of Measure B. Statement of Decision, at 13. AFSCME did not prove these "facts"—they were not disputed. Moreover, Request Nos. 32 and 33 did not simply attempt to establish "facts" as claimed by AFSCME; No. 32 asked the City to admit the overbroad proposition of "a vested entitlement to pension benefits" in general. There was no such broad proposition decided at trial.

2. Section 1507-A

AFSCME misstates the Court's holding as to Section 1507-A. AFSCME claims that this Court's decision "implicitly" recognized that Section 1507-A violated vested rights of members placed in the VEP, but the City had denied its Request asking for this admission. AFSCME also claims that the Court's decision on section 1507-A "implicitly" recognized a pre-Measure B vested right to certain benefits, but the City had denied Request Nos. 20, 21, 43-45, 36, 37, 38, and 39, asking for admissions as to those nature of those benefits. AFSCME Br. at 10-11. These assertions are wrong.

This Court's decision did not make any such findings on Section 1507-A, implicit or otherwise. Rather, the Court's decision was based on the fact that Section 1507-A was tied to Section 1506-A which the Court found to be invalid: "The City does not explain how section 1507-A could be a voluntary alternative election given the invalidity of section 1506-A. For these reasons, 1507-A is also invalid." Statement of Decision, at 17.

Nor did the Court make any findings about the level of benefits offered by the VEP. It did not need to because there was no dispute about the pre- and post-Measure B level of benefits. AFSCME did not "prove" something that was undisputed.

3. Section 1511-A.

In connection with the COLA, AFSCME does not claim that it proved at trial that the COLA was a vested right. Rather AFSCME admits that the "City did not argue at trial that Federated members had no vested rights to COLA payments. AFSCME Br., at 9-10 (citing Statement of Decision, at 23). AFSCME's admission precludes any finding that AFSCME was forced to expend resources to prove this issue at trial, and defeats AFSCME"s claim for fees under Section 2033.420.

4. Other sections of Measure B.

AFSCME makes the remarkable claim that it would not have been required to "expend resources in proving that Section 1506-A, 1507-A, and 1510-A were unconstitutional" if the City had admitted AFSCME's broadly stated legal contentions. AFSCME Br., at 9. For example, AFSCME contends that it would have avoided expense if the City had admitted to Request No. 2, which asked the City to admit that "employees of San Jose have a right to receive the benefits that derive from the System under the terms and conditions in effect at the time such employee accepted employment." And similarly, if the City had admitted Request No. 3 which asked the City to admit that "San Jose employees' right to the benefits established under this system vested upon such employees' commencing employment with the City." AFSCME makes similar claims as to Nos. 8, 42, and 64.

AFSCME did not prove the contents of these Requests for Admission. These Requests beg the question as to which "benefits" are vested. The parties had a number of disputes at trial over the nature of the "terms and conditions in effect" when employees were hired—for example whether employees had a right to a particular "low cost plan" or to City funding of retiree healthcare unfunded liabilities. Many of these disputes were not related to sections upon which AFSCME prevailed, and in fact were decided in favor of the City. In sum, not all City benefits were at issue in this case, and of those at issue, the Court found that very few were in fact vested.

B. The Admissions Sought Were Not Of Substantial Importance

Even if the Court finds that AFSCME had proven the content of the Requests for Admission, which it did not, the Court must still deny AFSCME's motion because the "admission sought was of no substantial importance." Cal.Civ. Proc. Code § 2033.420.

"[T]o impose the cost-of-proof sanction[], a request for admission should have at least some direct relationship to one of the central issues in the case; *i.e.*, an issue which, if not proven , would have altered the results in the case." *Brooks,* 179 Cal.App.3d at 509.

This test cannot be met by AFSCME. As demonstrated above, the admissions sought were general and not tied to the specific sections of Measure B that the Court found to be invalid. Or they involved matters that were not contested at trial.

C. Defendant Had Reasonable Ground To Believe It Would Prevail On The Matters It Denied.

Section 2023.420 contains an exception where "the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." Cal. Code Civ. Proc. § 2033.420(b)(3). As one Court of Appeal explained, "[e]xpenses of proving disputed facts which an opposing party denies in response to a request for admission are not recoverable simply because the party promulgating the request prevails at trial." *Brooks*, 179 Cal.App.3d at 513. The test is "whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." *Id.* at 511. The threshold for a good-faith belief is low. For example, a party will be found to have had reasonable grounds for denying an RFA where it anticipates testimony supporting its denial, even when the anticipated testimony is never actually obtained. *See id* at 513.

In the instant matter, Defendant had a good-faith belief that it would prevail at trial on the matters at issue in the case. Many of the RFAs asked the City to admit to broadly worded statements that retirement benefits in general were vested or that Measure B interfered with employees' rights to benefits. (See nos. 2, 3, 8, 18, 32, 42, 60, 64, 69.) The Court ruled mostly in favor of the City on whether Measure B violated vested rights to certain benefits, upholding 10 of 13 sections. As to the few sections not upheld by the Court, the City had reasonable ground to believe it would prevail at trial. The Court's Statement of Decision may not have accepted the City's legal arguments, but the Court never suggested they lacked any reasonable basis. Accordingly, the City comes within this exception to Section 2033.420.

AFSCME asserts that *Wimberly v. Derby Cycle Corp.*, 56 Cal.App.4th 618, 635 (1997) mandates a fee award for time it spent establishing that AFSCME members had a vested right in COLA benefits. AFSCME Br. at 12. But *Wimberly* explicitly limits awards under Section 2033.420 to instances where a party fails to conduct "a reasonable investigation to ascertain the *facts*." *Id.* at 635 (emphasis added). In that case, the defendant bicycle manufacture denied several requests related to manufacturing defects and the plaintiff's need for medical care. *Id.* at 636. At trial, the Defendant failed to put on a single witness to provide factual support for its

denials. *Id.* The Court awarded fees under Code of Civil Procedure 2033.420, finding that the defendants had not conducted a reasonable investigation to ascertain the truth of the matters requested. *Id.* The situation in *Wimberly* is a far cry from the instant matter, where the RFA's involve legal—not factual—matters and there is no question of whether Defendants failed to make an investigation. This Court should reject plaintiff's expansive reading of *Wimberly*.

D. There Was Good Reason For Denying the Requests for Admission.

Costs-of-proof sanctions are not appropriate in this case, because the denied RFAs went to questions of law, not fact, and were not sufficiently tied to the case. As demonstrated by its meet and confer letter, the City consistently informed AFSCME that it would deny the RFAs because they were overbroad statements of law or paraphrased the Code and Charter. The City's meet and confer letter stated:

> Nos. 1, 2, 3, 6, 7, 8, 9. These requests are extremely vague and overbroad. They are not tied to Measure B, or any particular retirement benefit, but rather use general terms such as "benefits that derive from the System," "deferred compensation," "excise on current and future City employees," "entire employees," and "condition subsequent" among others. As they stand now, the City will need to deny these requests because they are so general.
>
> Nos. 11-55, 59, 60, 64, 79. These requests paraphrase City Charter and Administrative Code provisions on retirement benefits and also paraphrase the provisions of Measure B. Similarly, Nos. 82-88 paraphrase documents or official acts that will be the subject of judicial notice. Most of the issues in this case are questions of law concerning interpretation of the City's Charter, Administrative Code, and other written materials. There is no issue of fact concerning the actual language of these materials and the Court could take judicial notice of them.

Exhibit C to Teague Patterson Decl.

This meet and confer letter demonstrates that the City has consistently and in good faith told AFSCME exactly why it was denying the RFAs.

Plaintiff cites to a number of cases where costs-of-proof sanctions were awarded to a party that improperly denied a question of fact. *E.g.*, *Brooks*, 179 Cal.App.3d at 512 (awarding costs-of-proof sanctions to a party who denied an RFA without even conducting a minimal investigation into its factual validity); *Smith v. Circle P Ranch Co.*, 87 Cal.App.3d 267, 273 (Cal. App. 1978) (costs-of-proof sanctions appropriate where an answering party improperly denies a request "to admit the genuineness of any documents or truth of any matters of *fact*" (emphasis added)).

However, plaintiff does not cite to any cases where a court has awarded sanctions against a party that denies a request for admission of a matter of *law*. In the case at hand, Defendants denials all related to matter of law—not of fact – and they were reasonable given the overbroad and argumentative nature of the Requests.

There are few published decisions upholding fee awards under Section 2033.420 (or its predecessors). [1] And the circumstances here are inherently different from the typical cases in which courts have historically awarded fees. For example, in *Rosales v. Thermex-Thermatron*, the court upheld an award against defendant on grounds that some of defendant's responses to numerous requests for admission regarding successor liability were obviously false, and that "it was obvious at trial that [defendant] had a great deal more information than [its] responses to the requests for admissions indicated." 67 Cal.App.4th 187, 198 (1998). Further, the *Rosales* court found that defendant's responses to plaintiff's requests for admission "were deceptive." *Id.* at 199. In this case, there is no evidence, or any allegation, that the City's responses to Plaintiffs' requests for admissions were "obviously false" or "deceptive."

As discussed previously, the City had good reason to deny the disputed requests for admissions, and a good faith belief that it would prevail on its defenses at trial. Plaintiffs have presented no case law demonstrating that this case fits into the small set of cases where awarding fees is proper.

E. Costs-Of-Proof Sanctions Are Narrowly Limited To Fees And Expenses Related To A Particular Discovery Abuse

AFSCME's motion must be denied because it does not identify with specificity the relationship between the work for which it no seeks payment and the work caused by defendants' denial of RFAs. "The amount which may properly be assessed as sanctions is limited to those fees and expenses related to a particular abuse of discovery; no assessment may be made for expenses unrelated to specific grounds of the motion before the court." *Smith*, 87 Cal.App.3d at 267. AFSCME improperly tries to extend the reach of Section 2033.420, arguing that the issues in this

[1] There are unpublished decisions directly on point, and they support respondents' position. These cannot be cited per Rules of Court.

case are so interrelated that it would be impossible to parse out the attorneys' fees related to costs-of-proof for the specific RFAs and therefore all expenses incurred qualify for an award. Not so. In making this argument, AFSCME relies on *Akin v. Enterprise Rent-A-Car Co.*, 79 Cal.App.4th 1127,1133 (2000). But that case provides no guidance to the instant matter. That case involved an award of attorneys' fees under the FDCPA. *Id.* Its holdings have no bearing on the instant matter, which does not involve an award of FDCPA attorneys' fees, but rather costs-of-proof sanctions under Section 2033.420.

IV. CONCLUSION

For the above reasons, the Court must deny AFSCME's motion. There is no basis for an award of fees under Section 2033.420. AFSCME did not "prove" the assertions made in its Request for Admissions, and even if it did, this case comes within the its exceptions contained in Section 2033.420(b). The Requests for Admission were "of no substantial importance," the City had "reasonable ground to believe" it would prevail on the matters at issue, and "there was other good reason for the failure to admit."

There is no reasonable basis to support AFSCME's motion. It is based on an untenable premise that is inconsistent with the intent of the Code of Civil Procedure. And it would cause fee shifting under improper circumstances where a party seeks admissions regarding broad legal principles not directly at issue in the litigation.

DATED: September 12, 2014

Respectfully submitted,
MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
Linda M. Ross
Attorneys for Defendants
City of San Jose and Debra Figone, in Her Official Capacity

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On September 12, 2014, I served true copies of the following document described as on the interested parties in this action as follows: **DEFENDANTS' OPPOSITION TO PLAINTIFF AFCME LOCAL 101'S MOTION FOR PAYMENT OF EXPENSES OF PROOF UNDER CCP SECTION 2033.420**

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 12, 2014, at Oakland, California.

Kathy Thomas

SERVICE LIST

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